Study K-501 April 2, 1997

Memorandum 97-21

SB 177: Best Evidence Rule

On March 18, 1997, the Senate Committee on Criminal Procedure passed SB 177 (Kopp), the Commission's bill on proof of the content of a writing (Exhibit pp. 1-5), by a 7-0 vote. No one appeared in opposition to the bill, but Chairman Vasconcellos raised an issue for the Commission to consider.

Specifically, he suggested delaying the operative date by one year, so that attorneys can learn about the new rule before it becomes operative. His suggestion could be implemented by amending the transitional provision as follows:

> SEC. 9. (a) This act shall become operative on January 1, ~~1998~~ 1999.
>
> (b) This act applies in an action or proceeding commenced before, on, or after January 1, ~~1998~~ 1999.
>
> (c) Nothing in this act invalidates an evidentiary determination made before January 1, ~~1998~~ 1999, that evidence is inadmissible pursuant to former Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code. However, if an action or proceeding is pending on January 1, ~~1998~~ 1999, the proponent of evidence excluded pursuant to former Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code may, on or after January 1, ~~1998~~ 1999, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

The staff recommends this approach and seeks the Commission's approval.

Regardless of whether the bill is amended, it has been referred to the Senate Judiciary Committee. The hearing has not yet been scheduled. The Attorney General's office continues to have concerns about the proposal, despite staff's efforts to alleviate those concerns (see Exhibit pp. 6-7). Other organizations, such as the California Attorneys for Criminal Justice ("CACJ"), are still studying the bill and deciding what position (if any) to take in the legislative process.

Professor Mendez of Stanford University has written in support of the bill (Exhibit pp. 8-10).

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

SENATE BILL No. 177

Introduced by Senator Kopp

January 22, 1997

An act to amend the heading of Article 3 (commencing with Section 1550) of Chapter 2 of Division 11 of, to add Sections 1552 and 1553 to, to add Article 1 (commencing with Section 1520) to Chapter 2 of Division 11 of, and to repeal Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of, the Evidence Code, and to amend Section 1417.7 of, and to repeal and add Section 872.5 of, the Penal Code, relating to proof of the content of a writing.

LEGISLATIVE COUNSEL'S DIGEST

SB 177, as introduced, Kopp. Evidence: proof of the content of a writing.

Existing law sets forth the rules governing the proof of the content of a writing in a civil or criminal action or proceeding.

This bill would revise and recast the rules governing the proof of the content of a writing in a civil or criminal action or proceeding, as specified.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code is repealed.

SEC. 2. Article 1 (commencing with Section 1520) is added to Chapter 2 of Division 11 of the Evidence Code, to read:

Article 1. Proof of the Content of a Writing

1520. The content of a writing may be proved by an otherwise admissible original.

1521. (a) The content of a writing may be proved by otherwise admissible secondary evidence. The court shall exclude secondary evidence of the content of writing if the court determines either of the following:

(1) A genuine dispute exists concerning material terms of the writing and justice requires the exclusion.

(2) Admission of the secondary evidence would be unfair.

(b) Nothing in this section makes admissible oral testimony to prove the content of a writing if the testimony is inadmissible under Section 1523 (oral testimony of the content of a writing).

(c) Nothing in this section excuses compliance with Section 1401 (authentication).

(d) This section shall be known as the "Secondary Evidence Rule."

1522. (a) In addition to the grounds for exclusion authorized by Section 1521, in a criminal action the court shall exclude secondary evidence of the content of a writing if the court determines that the original is in the proponent's possession, custody, or control, and the proponent has not made the original reasonably available for inspection at or before trial. This section does not apply to any of the following:

(1) A duplicate as defined in Section 260.

(2) A writing that is not closely related to the controlling issues in the action.

(3) A copy of a writing in the custody of a public entity.

(4) A copy of a writing that is recorded in the public records, if the record or a certified copy of it is made evidence of the writing by statute.

(b) In a criminal action, a request to exclude secondary evidence of the content of a writing, under this section or any other law, shall not be made in the presence of the jury.

1523. (a) Except as otherwise provided by statute, oral testimony is not admissible to prove the content of a writing.

(b) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of a copy of the writing and the original is lost or has been destroyed without fraudulent intent on the part of the proponent of the evidence.

(c) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the proponent does not have possession or control of the original or a copy of the writing and either of the following conditions is satisfied:

(1) Neither the writing nor a copy of the writing was reasonably procurable by the proponent by use of the court's process or by other available means.

(2) The writing is not closely related to the controlling issues and it would be inexpedient to require its production.

(d) Oral testimony of the content of a writing is not made inadmissible by subdivision (a) if the writing consists of numerous accounts or other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

SEC. 3. The heading of Article 3 (commencing with Section 1550) of Chapter 2 of Division 11 of the Evidence Code is amended to read:

Article 3. Photographic Copies *and Printed Representations* of Writings

SEC. 4. Section 1552 is added to the Evidence Code, to read:

1552. (a) A printed representation of computer information or a computer program is presumed to be an

accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent.

(b) Subdivision (a) shall not apply to computer-generated official records certified in accordance with Section 452.5 or 1530.

SEC. 5. Section 1553 is added to the Evidence Code, to read:

1553. A printed representation of images stored on a video or digital medium is presumed to be an accurate representation of the images it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of images stored on a video or digital medium is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the images that it purports to represent.

SEC. 6. Section 872.5 of the Penal Code is repealed.

~~872.5. The best evidence rule shall not apply to preliminary examinations.~~

SEC. 7. Section 872.5 is added to the Penal Code, to read:

872.5. Notwithstanding Article 1 (commencing with Section 1520) of Chapter 2 of Division 11 of the Evidence Code, in a preliminary examination the content of a writing may be proved by an otherwise admissible original or otherwise admissible secondary evidence.

SEC. 8. Section 1417.7 of the Penal Code is amended to read:

1417.7. Not less than 15 days before any proposed disposition of an exhibit pursuant to Section 1417.3, 1417.5, or 1417.6, the court shall notify the district attorney (or other prosecuting attorney), the attorney of record for each party, and each party who is not represented by counsel of the proposed disposition. Before the disposition, any party, at his or her own expense, may cause to be prepared a photographic record of all or part of the exhibit by a person who is not a party or attorney of a party. The clerk of the court shall observe the taking of the photographic record and, upon receipt of a declaration of the person making the photographic record that the copy and negative of the photograph delivered to the clerk is a true, unaltered, and unretouched print of the photographic record taken in the presence of the clerk ~~and~~, the clerk shall certify the photographic record as such without charge and retain it unaltered for a period of 60 days following the final determination of the criminal action or proceeding. A certified photographic record of exhibits shall *not* be deemed ~~a certified copy of a writing in official custody pursuant to Section 1507~~ *inadmissible pursuant to Section 1521 or 1522* of the Evidence Code.

SEC. 9. (a) This act shall become operative on January 1, 1998.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 1998.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1998, that evidence is inadmissible pursuant to former Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code. However, if an action or proceeding is pending on January 1, 1998, the proponent of evidence excluded pursuant to former Article 1 (commencing with Section 1500) of Chapter 2 of Division 11 of the Evidence Code may, on or after January 1, 1998, and before entry of judgment in the action or proceeding, make a new request for admission of the evidence on the basis of this act.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1300 I STREET, SUITE 125
P.O. BOX 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE: (916) 322-2630
(916) 324-5413

File: SB177 March 23, 1997

Barbara Gaal, Counsel
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

RE: SB 177: The Secondary Evidence Rule

Dear Ms. Gaal:

This letter is in response to your recent letter regarding SB 177 and concerns expressed by our office relative to this bill.

The State Bar Committee on Rules and Procedure favors retention of the best evidence rule, because the rule is sound. The Bar Commission on Administration of Justice comments that the best evidence rule may be more necessary than ever, since advances in technology have made it easier to forge documents. The Bar Litigation Section highlights four problems with the proposed secondary evidence rule: it shifts the burden of proof from the proponent to the opponent of secondary evidence; it does not define what constitutes secondary evidence; it appears to change the burden on appeal from a preponderance of the evidence test to a substantial evidence test; and, it fails to adequately deter fraud. The Attorney General is particularly concerned about the lack of fraud deterrence and the shifting of the burden of proof.

To respond to these problems, you have suggested that use of secondary evidence be conditioned upon the consideration of factors such as whether secondary evidence is being used in an unanticipated matter; whether the original was suppressed or reasonably obtainable during discovery; whether there are dramatic differences between the original and secondary evidence; whether the original is unavailable; and whether the writing is central to the case or collateral.

Unfortunately, utilization of these factors does not solve the problem. Conditioning admissibility of secondary evidence on whether its use is unanticipated or the writing is collateral is vague; these terms are undefined. Furthermore, use of secondary evidence may be fully anticipated, and the evidence may

nevertheless be fraudulent. Determination of fraud may not be possible without examining the original. Moreover, it can never be known in advance whether a jury will consider any piece of evidence critical or merely collateral, especially if the jury cannot tell from secondary evidence whether the evidence is legitimate or is a deception.

Documents may come to light during trial, for example during rebuttal. A party may enter a case late in the discovery process. Therefore, that a writing was not suppressed, or may have been obtainable during discovery, does not dispense with the importance of examining the original writing. Even subtle differences between an original and secondary evidence may be critical, and these differences may not be discernable without reference to the original.

We believe the best evidence rule should be retained to deter against fraud, especially since fraud may not be apparent without reference to the original. In this context, the burden should be on the proponent of secondary evidence to show that the original is unavailable, not the other way around. If an original is unavailable, there are exceptions to the best evidence rule which allow the use of secondary evidence.

Again, thank you for sharing your thoughts relative to SB 177, and for your willingness to consider alternative viewpoints.

Sincerely,

DANIEL E. LUNGREN
Attorney General

STEPHEN M. BOREMAN
Deputy Attorney General

cc: The Honorable Quentin Kopp,
California State Senate
Mr. William Carter, Deputy Attorney General
Civil Law Division

STANFORD LAW SCHOOL, STANFORD, CALIFORNIA 94305-8610

MIGUEL A. MÉNDEZ
Adelbert H. Sweet Professor of Law

March 12, 1997

Tel (415) 723-0613
Fax (415) 725-8901
Email: mmendez@leland.stanford.edu

Hon. John Vasconcellos
State Capitol, Room 4061
Sacramento, CA 95814

Re: California Law Revision's Best Evidence Rule Recommendation

Dear Senator Vasconcellos:

I am writing to share with your committee my assessment of the California Law Revision's Best Evidence Rule Recommendation. I am a tenured professor at Stanford Law School, where I have taught for almost 20 years. One of my specialties is evidence. I have published extensively in the field and am the author of California Evidence (West 1993), a treatise that discusses the California Evidence Code as construed by the appellate courts and compares differences between the California and federal approaches to admissibility.

The Best Evidence Rule requires a party to prove the contents of a writing by offering the original of the writing in evidence. Subject to certain exceptions, the rule prohibits the proponent from proving the contents of the writing by testimony recounting its contents or by a copy of the writing. The rule is designed principally to minimize the risks of misinterpretation that could occur if the production of the original writing were not required.

The rule originated in the 18th century when pretrial discovery was virtually nonexistent and manual copying was the only means of reproducing documents. With the advent of new technologies capable of reproducing documents accurately, the justification for the rule was seriously undermined. Both the Evidence Code and the Federal Rules of Evidence now allow a party to prove the contents of a writing by offering, not the original, but a "duplicate original." A duplicate is a copy of the original "produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent

techniques which accurately reproduces the original."[1] In other words, a "xerox" copy will do so long as it is authenticated as a correct copy of the original and no serious question has been raised about the genuineness of the original.

The need to produce the "original" has been diminished further by the advent of computer-based word processing programs. The version of the document stored in the computer's memory would strike many computer users to be the "original" and not any particular printout made from the stored document. A recent amendment to the Evidence Code now recognizes that printouts of images stored on digital media may be offered to prove "the existence and content of the image stored on the * * * digital media."[2]

The Best Evidence Rule itself contains numerous exceptions to the requirement that the original be produced. Combined with the duplicate original doctrine, today it is more likely than not that a document will be proved in evidence by use of a copy rather than by the original. Of course, if a nontrivial dispute arises over the existence of the original or its terms, the court may order that proof be made by the original document.

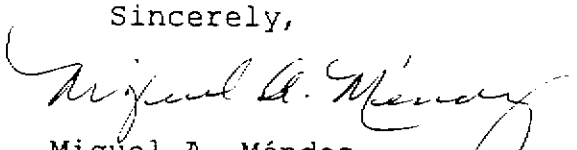
In civil cases, today's broad pretrial discovery practices make it unlikely that a dispute over the genuineness of the original document will erupt at trial. Parties have ample opportunities to examine prior to the trial the documents their opponents plan to offer. Consequently, the need in civil cases for a rule requiring the use of the original to prove the contents of a writing is hardly justified. Indeed, technological innovations and contemporary pretrial discovery practices call for the opposite approach recommended by the Law Revision Commission: a rule that expressly allows the use of copies to prove the contents of the original unless a genuine dispute arises over the existence or terms of the original, or the court finds that admitting the copy would be unfair to the opponent under the circumstances. The Commission's recommended rule preserves the sensible requirement that, where a written copy is available, it should be preferred over testimony. Accordingly, I concur in the recommendation that the Best Evidence Rule be abolished and replaced with a general rule favoring the admissibility of secondary as well as of original writings to prove the contents of the original writing.

---

[1]California Evidence Code § 260; Federal Rule of Evidence 1001(4).

[2]California Evidence Code § 1500.6.

Sincerely,



Miguel A. Méndez
Adelbert H. Sweet Professor of Law